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SYNOPSIS OF ARGUMENT.

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 528

BROAD RIVER POWER COMPANY, COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, AND F. D. CAMPBELL, PETITIONERS,

versus

STATE OF SOUTH CAROLINA, EX REL., JOHN M. DANIEL, ATTORNEY GENERAL, CITY OF COLUMBIA, TOWN OF ARDEN, TOWN OF EAU CLAIRE, COLUMBIA COLLEGE, CHICORA COLLEGE FOR WOMEN, DR. W. B. BURNEY, NORTH COLUMBIA LAND COMPANY, THE RAILROAD COMMISSION AND THE COLUMBIA SCHOOL BOARD

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

The brief of respondents in opposition to the petition for writ of *certiorari* respectfully shows to this Honorable Court:

GROUNDS FOR DECISION OF SUPREME COURT OF SOUTH CAROLINA

I

Columbia Railway, Gas & Electric Company was chartered by special Act of the South Carolina Legislature dated 16th September, 1891, with the name *Columbia Electric Street Railway, Light and Power Company* (the name having been changed in 1911).

Under this Act the Company acquired the franchise to carry on the electric street railway, light and power (and gas) business in Columbia, S. C., and vicinity. The charter was granted for a period of fifty years (R., pages 809–811). These rights had previously been granted to different companies for various periods.

This charter was accepted by resolution of the stockholders of the Company, and the old companies ceased to exist. The Company then proceeded to construct its power plant and inaugurate its electric street railway, light and power business (R., pages 489–510).

The Supreme Court of South Carolina held that under this State charter there was granted a combined franchise for the operation of the electric street railway, light and power business—all public services—inseparably linked, and that the street railway service could not be separately abandoned (R., pages 218–235).

It was not held by the South Carolina Supreme Court, and is not contended by us, that a simple separate charter for the operation of street railway service requires operation at a loss.

II

This fifty-year State charter gave the right to construct electric street railway tracks through the streets of Columbia "with the consent of City Council" (R., page 812).

The Company made written application to the City for such consent, submitting an ordinance to accomplish that purpose (R., pages 832–833). City Council passed ordinances giving

its consent and prescribing the terms under which the right was granted (R., page 838).

These ordinances provided among other things for the maintenance of a schedule of operation (*i. e.*, "a car for passengers at least every hour from 7:00 A. M. to 9:00 P. M."), and prescribed a *"Penalty for Failure to Run"* (R., pages 834, 835 and 836). They also reserved the right to the City to regulate the manner of operating said electric railway and to amend the ordinances relating thereto as public welfare may demand (R., page 840). Under these and subsequent ordinances the Company erected its poles and wires and constructed its tracks through the principal streets of the City of Columbia (R., pages 489–510).

The Broad River Power Company is now making use of these poles in connection with the electric and power business.

The City of Columbia is a party to this suit asking that its rights be enforced herein.

The Supreme Court of South Carolina held that these ordinances, together with the Company's operations thereunder, constituted a supplemental contract with the City of Columbia, which required operation for the fifty-year term of the Company's charter and against which alleged losses were no defense (R., pages 235–239).

III

In the development of its system, the Company entered into various written contracts with land development companies providing for the operation of its electric railway service.

In 1906 the Company acquired a line from the North Columbia Land Company under a contract providing that, after the completion of the line, the Company would "thenceforth maintain and keep it in good condition and repair, and run and operate street railway cars over the said line and extension, in connection with its line of street railway in and near the said City of Columbia, on convenient and reasonable schedules of not less than one car for every hour from eight o'clock in the morning to eight o'clock at night, and as much less and oftener as travel will warrant of each day . . . ." (R., pages 851–854).

Substantially similar contracts were entered into with the Columbia Land and Investment Company (in 1902, for 99 years, R., pages 864–868), and in 1910 with the Shandon Annex Company (R., page 855).

A considerable portion of the entire railway system was acquired under contracts with such land development companies.

The rights-of-way acquired and the poles constructed thereon under these contracts providing for electric street railway service, have always been used and are now being used also for carrying the electric current sold for light and power (R., pages 315–376).

The North Columbia Land Company is a party to this suit demanding that its rights be enforced herein.

The Supreme Court of South Carolina held that these contracts are valid subsisting contracts requiring the operation of the system, intended for the benefit of the public and enforcible in this proceeding (R., pages 239–242).

IV

Following the deflation of 1920–1921, and a strike of its motormen and conductors in 1922, the Company allowed its street railway equipment to be undermaintained (R., pages 730–740).

In 1924, the Barstow interests of New York City acquired practically all the stock, common and preferred, in Columbia Railway, Gas & Electric Company, organized the Broad River Power Company, and exchanged the Columbia Railway, Gas & Electric Company stock for preferred stock in Broad River Power Company (R., pages 662–696).

In March, 1925, the Companies secured the passage by the South Carolina Legislature of the so-called Merger Act (R., page 806).

In July, 1925, the Companies had the Columbia Railway, Gas & Electric Company execute a deed purporting to transfer to the Power Company, pursuant to said Merger Act, all its electric light and power (and gas) properties, including the power plants, substations, car barns, and poles formerly used

in connection with the electric railway operations, reserving only certain property and rights said to be connected with the street railway department (R., page 1070).

The appraised value of the physical property so transferred exceeded the liabilities by $4,353,511 (R., pages 634–635), exclusive of the valuation $1,561,000 placed upon the franchise so transferred.

The Railroad Commission, the Special Referee, and the Supreme Court of South Carolina, all held that this attempted transfer was without consideration, inoperative, and that under the said Merger Act the Companies must be treated as having been merged into one (R., pages 825, 206–213).

In March, 1928, the Columbia Railway, Gas & Electric Company discontinued electric street railway service altogether.

The South Carolina Railroad Commission and the Supreme Court of South Carolina both found, as a matter of fact, that the Companies had not made an honest effort to operate the system successfully, and that the system if honestly operated would yield a fair return.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. The Supreme Court of South Carolina having construed the Act of the South Carolina Legislature granting a charter to the Columbia Railway, Gas & Electric Company as constituting one franchise for the operation of an electric street railway, light and power (and gas) system, and having further found that the electric street railway is inseparably linked with the electric light and power phases of the Companies' franchise, both by virtue of the State charter and by virtue of its physical construction, it is apparent that the decisions of this Court in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S., 369, 64 L. Ed., 323, and other cases (254 U. S., 513, 264 U. S., 79, 236 U. S., 585), so much relied upon by petitioner, do not authorize the abandonment of the street railway service.

On the other hand the question here involved is controlled by the decision of this Court in *Missouri P. R. Co. v. Kansas*,

216 U. S., 262, 54 L. Ed., 472; *Atlantic Coast Line R. R. Co. v. N. C. Corporation Commission*, 206 U. S., 1, 51 L. Ed., 933; *Chesapeake and O. R. Co. v. Public Service Com.*, 242 U. S., 603, 61 L. Ed., 520; *Fort Smith Light and T. Co. v. Bourland*, 267 U. S., 330, 69 L. Ed., 631, and by the decision of the South Carolina Supreme Court in *Spartanburg v. S. C. Gas & Electric Co.*, 130 S. C., 125.

The principle established by these cases is that a public service corporation must perform all the services authorized by its charter as long as it retains any of the benefits of the charter granted by the State—and that the obligation must be determined by the productiveness of the corporate business as a whole.

Neither is the principle established by the decision in the case of *Northern Pac. R. Co. v. North Dakota*, 235 U. S., 585, applicable or controlling. In that case the Court held the fact that the railroad was earning an adequate return on its business as a whole did not justify an inadequate rate on a particular commodity. Manifestly the principle announced in this decision does not permit or authorize a public service corporation to abandon part of a service or obligation required by its charter on account of the fact that such part of the service is being carried on at a loss. If that part of the service devoted to street railway operation is unremunerative petitioners' remedy is not to abandon such service but rather to apply to the proper tribunal for an increase in rates.

(a) The decision of the State Court that the Act under which the Railroad Company was incorporated constituted a grant of a combined franchise for electric street railway, light and power (and gas) service is in accordance with the decisions of this Court, as well as prior decisions of the State Court.

Atlantic & Gulf R. R. Co, v. State of Georgia, 98 U. S., 359, 25 L. Ed., 185.

Rochester R. R. v. City of Rochester, 205 U. S., 236, 51 L. Ed., 784.

R. R. Company v. Gibbes, 27 S. C., 385.

(b) Furthermore the Act in question being a Statute of the State of South Carolina and having been construed by the highest Court of the State, this Court will follow such construction.

Supreme Lodge v. Meyer, 265 U. S., 30, 68 L. Ed., 885.

State of Missouri v. North, 271 U. S., 40, 70 L. Ed., 818.

2. The ordinances under which the Companies acquired the right to operate their system in the City of Columbia constitute contracts which the Supreme Court of South Carolina rightfully found to require operation of the Street Railway system.

Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S., —, 46 L. Ed., 592.

Columbus Ry. Co. v. Columbus, 249 U. S., 399, 63 L. Ed., 669.

Spartanburg v. S. C. Gas & Electric Co., 130 S. C., 125.

(a) It is well settled that a public service corporation cannot because of loss escape such obligation.

Columbus Ry. Co. v. Columbus, 249 U. S., 399, 63 L. Ed., 669.

Milwaukee Electric Railway & Light Co. v. State of Wisconsin, etc., 252 U. S., 100, 64 L. Ed., 476.

Fort Smith Light & T. Co. v. Bourland, 267 U. S., 330; 69 L. Ed., 631.

(b) The general rule is that while this Court will decide the question of contract for itself, it will lean to an agreement with the State Court.

Georgia Railway & Power Company v. Decatur, 262 U. S., 432, 67 L. Ed., 1065.

3. The Supreme Court of South Carolina held that the contract with the North Columbia Land Company, and the contract with other development Companies, were existing and valid

agreements which required continued operation of the street car system of the petitioners.

Irrespective of the other valid grounds upon which the decision of the Court is placed, this in itself is a sufficient and adequate basis to sustain the decision of the State Court, and inasmuch as this ground involves no Federal question this Court will not review the judgment below.

Arkansas So. R. R. Co. v. German Natl. Bank, 207 U. S., 270, 52 L. Ed., 201.
Consolidated Turnpike Co. v. Norfolk, etc., R. Co., 228 U. S., 596, 57 L. Ed., 982.
Municipal Securities Corp. v. Kansas City, 246 U. S., 63, 62 L. Ed., 579.
Bilby v. Stewart, 246 U. S., 255, 62 L. Ed., 701.
Am. Ry. Express Co. v. Kentucky, 273 U. S., 269, 71 L. Ed., 639.

In *Municipal Securities Corp. v. Kansas City, supra*, the Court said:

> "It therefore follows that the Missouri Supreme Court rested its decision upon a ground of general law adequate to support it, independently of the decision upon alleged violation of Federal right under the Fourteenth Amendment. In that situation it is well settled that a case from a State Court is not reviewable here."

And in *Bilby v. Stewart, supra*, it is held that where the State Court "rests its judgment upon a non-Federal ground adequate to support it, the existence of a Federal question is of no significance."

In *American Railway Express Company v. Kentucky, supra*, the Court, speaking through Mr. Justice Reynolds, said:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the State Courts upon questions of local law, both statutory and common. The due process clause does not take up the laws of the several states and make all questions pertaining to them

constitutional questions, nor does it enable this Court to revise the decisions of the State Courts upon questions of State law.'"

4. In addition to the foregoing grounds, any one of which we respectfully submit is sufficient in itself to sustain the judgment of the Court below, the petitioners are not in a position to seek a review of the judgment of the South Carolina Supreme Court because the record in this case clearly showed, and the State Court so found, that the petitioners for several years prior to the cessation of operation made no *bona fide* effort to operate the street railway system, but on the contrary made every effort to aggravate the losses.

This being the case this Court should not grant the petition or review the judgment.

U. S. v. Johnston (N. Y., 1925), 45 S. Ct., 496. 268 U. S., 220, 69 L. Ed., 925, reversing (C. C. A., 1923), 290 F., 120.

Jackson v. State (1926), 280 S. W., 202, 103 Tex. Cr. R., 318, *certiorari* denied (1926), 46 S. Ct., 474, 271 U. S., 661, 70 L. Ed., 1138.

"It is not the province of this Court to weigh conflicting testimony. The record shows testimony supporting the verdict, and that is as far as this Court enters upon a consideration of that question."

Great Northern R. Co. v. Donaldson (Wash., 1918), 246 U. S., 121, 38 S. Ct., 230, 62 L. Ed., 616.

"In cases coming from a State Court we do not review questions of fact, but accept the conclusions of the State tribunals as final."

Christman v. Miller (Cal., 1905), 107 U. S., 313, 25 S. Ct., 468, 49 L. Ed., 770, a chancery case.

For all these reasons, we respectfully submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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